BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	Investigation 15-11-007 (Filed November 5, 2015)

RESPONSE OF THE OFFICE OF RATEPAYER ADVOCATES TO THE "MOTION OF AT&T CALIFORNIA (U-1001-C) AND NEW CINGULAR WIRELESS PCS, LLC (U-3060-C) TO STRIKE PORTIONS OF ORA REPLY BRIEF"

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I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) opposes AT&T California and New Cingular Wireless PCS, LLC (AT&T)'s attempt to strike portions of ORA's Reply Brief. AT&T argues that ORA's Reply Brief contains "de facto" new testimony, which is simply wrong. Tellingly, AT&T cannot (and does not) cite to a single statement in ORA's Reply Brief that is a "new fact." Instead, AT&T mistakenly characterizes ORA's rebuttal arguments as "new" statements of fact. AT&T's motion should be immediately denied.

In addition, ORA is concerned that AT&T's motion to strike contains several paragraphs of rebuttal arguments in support of Dr. Debra Aron's testimony, which was heavily criticized by ORA's Reply Brief. AT&T now attempts to augment its previous arguments, without permission from the ALJ to do so. If AT&T had wanted to file a rebuttal brief, it should have requested permission to do so.

II. DISCUSSION

AT&T's motion to strike is based on the false premise that ORA's Reply Brief contains "new facts" that were not mentioned in ORA's testimony. However, it is apparent that ORA's Reply Brief does not contain any actual "new facts," because AT&T

did not cite to a single instance of ORA's alleged transgression. Facts cited to by ORA in its Reply Brief were carefully footnoted to the location in ORA's testimony where they came from. All of ORA's arguments are made in rebuttal to arguments made in AT&T's Opening Brief.

Instead, AT&T cites to legitimate arguments in ORA's Reply Brief, which are on their face not "new facts" at all. For example, AT&T points out that "ORA now claims, for the first time, that Dr. Aron cherry-picked portions of the Dr. Caves econometric study."[1] However, this is an example of a legitimate argument made in rebuttal to a statement in AT&T's Opening Brief, not a "new fact." No reasonable person would characterize an argument that Dr. Aron is "cherry-picking" portions of the Caves study as a "new fact" that could only be contained in expert testimony.

AT&T also misquotes ORA's Reply Brief when it alleges that ORA conducted a "hypothetical monopolist" test for the first time.[2] To be clear, ORA's Reply Brief quoted from the U.S. Department of Justice's *Horizontal Merger Guidelines*, which discuss a "hypothetical monopolist test." The *Horizontal Merger Guidelines* were extensively cited in ORA's testimony; again, this is not a "new fact." AT&T's motion makes it seem as if ORA is actually performing a new analysis, which is not what is happening in ORA's Reply Brief. Instead, ORA's Reply Brief compares and contrasts the *Horizontal Merger Guidelines* to the Caves study. This is a legitimate analysis, not a "new fact," and there is no requirement that such a comparison be excluded from a parties' brief.

These are the only two examples that AT&T mentions to allegedly demonstrate that ORA used "new facts" in its Reply Brief. In addition, AT&T failed to request a third round of briefing, and as a result of this oversight AT&T inserts several paragraphs of new argument and analysis, under the pretense that this is what it "could have explained"

[1] AT&T Motion to Strike at 2.

[2] Id. at 3.

earlier.[3] AT&T's motion is actually an attempt to augment the record under the guise of a request to strike.

III. CONCLUSION

It is apparent that AT&T's motion to strike has no legitimate grounds because AT&T cannot cite to any instances where ORA alleged "new facts" in its Reply Brief that were unsupported by testimony. All of the facts used by ORA in its Reply Brief are carefully footnoted and supported by the existing testimony. The example cited by AT&T, where ORA accused Dr. Aron of "cherry-picking" the data, is a legitimate form of criticism. AT&T fails to explain or delineate any standards or case law that would show that such an argument must be contained in testimony and cannot be in a brief. Certainly, AT&T's own Reply Brief is full of arguments that were not specifically mentioned by its own experts. ORA respectfully requests that AT&T's motion to strike be denied.

Respectfully submitted,

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[3] AT&T Motion to Strike at 3.